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A GREAT GAMBLE: WHY COMPROMISE IS THE BEST BET TO RESOLVE FLORIDA'S INDIAN GAMING CRISIS

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I. INTRODUCTION

"Indian gaming is a national multi-billion dollar enterprise and growing."[1] Even in 2008, amidst an economic downturn, the revenues generated by the tribal gaming industry continued to show growth.[2] In 2008 alone, Indian gaming generated $26.7 billion[3] and accounted for a little more than a quarter of the gaming industry revenues in the United States.[4] The explosion of tribal gaming "has been fueled by Americans' seemingly insatiable appetites for slots, high-stakes poker, and bingo."[5] Indian gaming serves as the single source of income for a number of tribes and is the lifeblood of many tribes' finances.[6] Tribes use their gaming profits to "fund education, improve health and elder care, enhance police and fire departments, build housing and roads, develop environmental

1. Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 73 (2004–2005) (footnote omitted); *see* Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 414 (2009) (noting "[t]oday, tribal gaming is the fastest-growing segment of legalized gambling in the United States.").

2. Press Release, National Indian Gaming Commission, NIGC Announces 2008 Revenues (June 3, 2009), *available at* http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR113062009/tabid/918/Default.aspx [hereinafter NIGC Press Release]. The Commission Chairman noted the industry's growth was less than it had been in recent years and pointed to the economic downturn as the cause. *Id.* However, it is important to note that "industry growth is not uniform across tribes, states, or gambling facilities." Light & Rand, *supra* note 1, at 424. A tribe's location is a key factor in determining how much income a tribal casino will generate. *Id.*

3. NIGC Press Release, *supra* note 2. NIGC statistics are based on independent audit reports of all tribal gaming operations received by the NIGC from the tribes. *Id.* Gaming revenues represent amounts wagered by gaming patrons, less prizes paid. *Id.* Indian gaming revenues for 2008 increased by 2.3% over the prior year. *Id*. In the Washington Region, which includes tribal gaming operations in Alabama, Connecticut, Florida, Louisiana, Mississippi, North Carolina, and New York, there was a 5.9% increase in gaming revenue over the prior year, with gaming revenues exceeding $6.7 billion. NIGC.gov, Tribal Gaming Revenues (in thousands) by Region: Fiscal Year 2008 and 2007, http://www.nigc.gov/LinkClick.aspx?fileticket=ovXzGP81fLY%3d&tabid=918 (last visited Oct. 12, 2009).

4. Light & Rand, *supra* note 1, at 416.

5. Light & Rand, *supra* note 1, at 414.

6. Fletcher, *supra* note 1, at 73. "Without question, gaming revenues have brought many tribes back from a very desperate state of dependency and near-extinction." *Id.* at 75 (footnote omitted).

programs, launch commercial ventures, and buy back reservation lands."[7] Namely, Indian gaming moves American Indians, "who have historically been the poorest of the poor, from welfare to work by providing job opportunities and diminishing the state's responsibility to make public entitlement payments."[8] Similarly, tribal casinos benefit non-tribal jurisdictions and contribute to local economic development by creating hundreds of thousands of jobs for non-Indians and generating billions of dollars in economic development for the surrounding communities.[9]

On November 14, 2007, Florida Governor Charles Crist, on behalf of the State of Florida, attempted to capitalize on this multi-billion dollar enterprise when he signed a twenty-five-year gambling compact (Compact)[10] with the Seminole Tribe of Florida (Tribe).[11] In signing the Compact, Crist ended sixteen years of negotiations and significantly expanded casino gambling in Florida.[12] Among other things, the Compact gave the Tribe the exclusive right to conduct several types of Class III gaming,[13] including slot machines, any banking or "banked" card games, and high stakes poker games, all of which are illegal under Florida law.[14] In exchange for the "partial but substantial exclusivity" to operate the games, the Tribe committed to pay the State of Florida a share of its gaming revenue, amounting to more than $100 million a year.[15]

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7. Sandra Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545, 545 (2003); *see* Light & Rand, *supra* note 1, at 426.

8. Light & Rand, *supra* note 1, at 426 (footnote omitted); *see* Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 416–17 (2006) (noting the economic and social benefits that states with Indian gaming operations and non-reservation communities located near tribal casinos have received from gaming operations).

9. *See* Ashton, *supra* note 7, at 545–46; Light & Rand, *supra* note 1, at 416; *see also* National Indian Gaming Association, Indian Gaming Facts, http://www.indiangaming.org/library/indian-gaming-facts/index.shtml (last visited Oct. 12, 2009) [hereinafter Indian Gaming Facts] (noting Indian Gaming created more than 670,000 jobs with 75% of those employees being non-Indian). Not all commentators view Indian gaming with such enthusiasm. *See* Bernard P. Horn, *Is There a Cure for America's Gambling Addiction?*, USA TODAY MAGAZINE, May 1997, at 34, 35, *available at* 1997 WLNR 6897618 (noting "a considerable body of evidence showed that the expansion of legalized gambling destroys individuals, wrecks families, increases crime, and ultimately costs society far more than the government makes").

10. Fla. House of Representatives v. Crist, 999 So. 2d 601, 603 (Fla. 2008); Robert M. Jarvis, *The 2007 Seminole-Florida Gambling Compact*, 12 GAMING L. REV. 13, 13 (2008). For a copy of the Compact, see *Crist*, 999 So. 2d at 622–43. A copy of the Compact is reprinted in *Crist*.

11. The Seminole Tribe "is a federally recognized tribal government possessing sovereign powers and rights of self-government." *Crist*, 999 So. 2d at 623 (discussing Part II.A).

12. *Crist*, 999 So. 2d at 603; Jarvis, *supra* note 10, at 13.

13. *See infra* Part II (discussing Class III gaming).

14. *Crist*, 999 So. 2d at 603, 606.

15. *Id.* at 606. The Tribe would pay the state $50 million once the Compact becomes effective, $175 million over the first twenty-four months of operation and $150 million for the third

Less than a year after the execution of the Compact, however, the Speaker of the Florida House of Representatives sued the governor in the Florida Supreme Court, alleging that he had overstepped his bounds.[16] The Florida Supreme Court held the governor did not possess the authority to bind the State to a gaming compact that clearly departed "from the State's public policy by legalizing types of gaming that are illegal everywhere else in the state."[17] Notably, the ruling did not invalidate the Compact.[18]

While the validity of the Compact remained uncertain, the Tribe continued to operate the illegal games in several of its casinos throughout Florida,[19] claiming it is not required to abide by the ruling because "Florida enjoys no compulsory authority over activities on [Indian] lands."[20] The Tribe further asserted it has the authority to operate the games under the Indian Gaming Regulatory Act (IGRA).[21]

To address this issue, the Florida Legislature proposed legislation[22] that laid out the framework for a new compact (Proposed Compact).[23] Notably,

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twelve months of operation. *Id.* For each twelve-month cycle after that, the Tribe would pay the State a minimum of $100 million. *Id.*; *see Crist*, 999 So. 2d at 634, 641–43. "Indian Gaming Report, which monitors Tribal casinos, estimates the Seminoles had more than $1 billion in gaming revenue in 2006." Jim Freer, *FL Tracks Wary as Tribal Gaming Expands*, BLOOD-HORSE MAGAZINE, June 13, 2008, *available at* http://www.bloodhorse.com/horse-racing/articles/45713/fl-tracks-wary-as-tribal-gaming-expands (last visited Oct. 12, 2009).

16. *See* Robert M. Jarvis, *2007–2008 Survey of Florida Gambling Law*, 33 NOVA L. REV. 231, 243 (2008).

17. *Crist*, 999 So. 2d at 603.

18. Mary Wozniak, *If Gaming Deal Fails, Seminole Tribe to Take It to Feds*, FORT MYERS NEWS-PRESS, June 16, 2009, at A1.

19. Letter from Bill McCollum, Attorney General of Florida, to Philip N. Hogen, Chairman, National Indian Gaming Commission (Sept. 19, 2008), *available at* http://media.tbo.com/pdf/091908hogenletter.pdf. [hereinafter Letter from McCollum] (noting "[d]espite the Florida Supreme Court's ruling, the Tribe continues to offer banked card games and [C]lass III slot machines."); *see* Mary Ellen Klas, *Ruling Won't Halt Seminoles' Card Games*, MIAMI HERALD, July 20, 2008, at A1, *available at* 2008 WLNR 13529589.

20. *See* Response of Governor Crist in Opposition to the Petition for Writ of Quo Warranto at 3, Fla. House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008) (No. SC07-2154) [hereinafter Crist Response]; *see, e.g.*, Teta v. Brooks, 614 N.W.2d 242, 244 (Minn. Ct. App. 2000) (holding state courts, absent a grant of federal authority, have no jurisdiction over Indians, Indian tribes or other Indian entities).

21. Jon Burstein, *Does Ruling Put Hard Rock in a Hard Place? Table Games May Be Eliminated*, S. FLA. SUN-SENTINEL, July 5, 2008, at A1, *available at* 2008 WLNR 12625224 (noting "[t]ribal attorneys say the casino has the authority to operate the games under federal law . . . because the U.S. Department of the Interior approved the [Compact][.]"); *see* Wozniak, *supra* note 18 (noting the Compact has federal approval and according to a tribal attorney "remains in effect until appropriate federal agencies or courts say it is no longer effective.").

22. An Act Relating to Indian Gaming, S. 788 (Fla. 2009), *available at* http://www.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s0788er.pdf. [hereinafter Gaming Act].

the Proposed Compact increased the annual payments the Tribe must make to the State, yet it decreased the number of casinos at which the Tribe is permitted to operate Class III games.[24] Nearly two months following its passage, the Tribe and the governor signed the Proposed Compact.[25] Not surprisingly, however, the Tribe rejected several key provisions the Legislature originally set forth in the Proposed Compact.[26] As a result, many Florida lawmakers are reluctant to ratify the revisions in the Proposed Compact, leaving the future of Indian gaming in Florida highly uncertain.[27]

This Note examines the controversy and key issues surrounding the nearly two-decade-long clash between the Tribe and the State of Florida over the operation of Class III games on tribal lands in Florida. Using Florida as a backdrop, this Note illuminates three significant issues currently at the center of Indian gaming law: (1) whether a compact may permit Class III games that a state's laws explicitly prohibit; (2) whether a tribe's political leverage in compact negotiations is weakened in light of *Seminole Tribe of Florida v. Florida* (*Seminole Tribe*)[28] and *Texas v. United States*;[29] and (3) whether the Secretary of the Department of the Interior (Secretary) has the unilateral authority to promulgate rules in the absence of a compact. By analyzing these issues in the context of Florida's Compact and the Proposed Compact, while drawing on similar situations in other states, this Note provides guidance to other states hosting Indian gaming facilities within their borders.[30]

Part II of this Note discusses IGRA and explains the Indian gaming compact procedure, highlighting federal and Florida gaming laws. Part II further unveils the history of Florida's Compact negotiations and explores the issues and controversy surrounding the Compact. Part III of this Note analyzes the Compact's validity under IGRA, concluding the Compact is invalid because it authorizes games that are expressly prohibited by Florida criminal law (thereby failing to meet one of IGRA's requirements). Part III

23. *See* Mary Ellen Klas, *Gov. Charlie Crist Resumes Gambling Talks with Seminoles*, MIAMI HERALD, July 1, 2009, *available at* 2009 WLNR 12560041.

24. Catherine Dolinski, *Gaming Deal May Need Alteration*, TAMPA TRIB., June 13, 2009, at 4, *available at* 2009 WLNR 11646530. For a comparison of the terms of the Compact with the terms of the Proposed Compact, see *infra* Part IV.B.

25. Press Release, Charlie Crist, Governor of Florida, Governor Crist, Seminole Tribe of Florida Sign Estimated $6.8 Billion Compact (Aug. 31, 2009), *available at* http://www.flgov.com/release/11004 [hereinafter Crist Press Release].

26. Catherine Dolinski, *Gaming Deals Approval Not Set in Stone*, TAMPA TRIB., Sept. 6, 2009, at 13, *available at* 2009 WLNR 18247797.

27. *Id.*

28. 517 U.S. 44 (1996).

29. 497 F.3d 491 (5th Cir. 2007).

30. There are twenty-eight states that host tribal gaming facilities within their borders. Indian Gaming Facts, *supra* note 9.

further suggests the Seminole Tribe is currently operating illegal Class III games. Part IV of this Note explores the complex enforcement issues surrounding the Compact and outlines the Proposed Compact as well as the Tribe's response to the Proposed Compact. Part IV further highlights the issues the State and the Tribe should consider in evaluating which revised provisions of the Proposed Compact to accept. Finally, Part IV challenges the parties to work together in creating a compact that is mutually beneficial.

II. BACKGROUND

A. *Opening Line: The Indian Gaming Regulatory Act and the Compact Procedure*

Prior to the enactment of IGRA in 1988, states did not play a role in Indian gaming regulation.[31] IGRA was enacted to establish a federal regulatory authority over gaming on tribal lands.[32] More generally, Congress intended IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]"[33] Among other things, IGRA "defines classes of Indian gaming, establishes the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming, and provides a tribal-state 'compacting' procedure through which states may participate in the regulation of Indian gaming."[34]

IGRA divides Indian gaming into three classes of escalating stakes, the most important of which is Class III.[35] Class III gaming is the catch-all category comprised of "all forms of gaming that are not [C]lass I gaming or

31. Complaint at 2, Seminole Tribe of Fla. v. United States, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317).

32. Indian Gaming Regulatory Act, 25 U.S.C § 2702(3) (2006).

33. *Id.* § 2702(1); *see* Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 108 n.49 (1996) (citing 25 U.S.C. § 2702(2) (2006) (noting IGRA also aimed to ensure gaming was "conducted fairly and honestly" on Indian lands by shielding Indian gaming from corruptive influences and ensuring "the Indian tribe is the primary beneficiary of the gaming operation")).

34. Monaghan, *supra* note 33, at 108–09 (citing 25 U.S.C. §§ 2703–2710 (2006)).

35. Monaghan, *supra* note 33, at 109 (citing 25 U.S.C. § 2703(8) (2006)). Class I games are traditional tribal or social games played for prizes of minimal value and are exclusively regulated by the tribes. *Id.* at n.53 (citing 25 U.S.C. §§ 2703(6), 2710(a)(1) (2006)). Class II games are games of chance which are played for prizes and include bingo, pull-tabs, and other similar games. *Id.* (citing 25 U.S.C. § 2703(7) (2006)). Class II games are also regulated by the tribes, but each tribe conducting Class II gaming is required to have a tribal gaming ordinance approved by the National Indian Gaming Commission (NIGC). 25 U.S.C. § 2710(b)(1)(B) (2006). For a detailed explanation of the three classes of games under IGRA, see Texas v. United States, 497 F.3d 491, 494 (5th Cir. 2007).

[C]lass II gaming,"[36] and includes any casino-style or "banking" game,[37] such as blackjack, roulette, and craps; slot machines; and lotteries.[38] Importantly, Class III gaming activities are lawful on Indian lands only if those activities are: (1) authorized by a tribal ordinance; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) "conducted in accordance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect."[39]

IGRA prescribes a negotiating process for Class III gaming activities between the Indian tribes and their host states.[40] "Upon a tribe's request, a state '*shall* negotiate with the Indian tribe in good faith to enter into such a compact.'"[41] If the parties negotiate a compact successfully and the Secretary approves it, notice of the approval is published in the Federal Register and the compact takes effect.[42] If the state fails to negotiate in good faith and the state and the tribe do not achieve a mutually satisfactory compact, IGRA allows a tribe to sue the state in federal court.[43] Importantly, however, states are not forced to consent to such lawsuits because the U.S. Supreme Court held in *Seminole Tribe of Florida v. Florida*[44] that IGRA does not abrogate the states' Eleventh Amendment immunity to these suits.[45]

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36. 25 U.S.C. § 2703(8) (2006).

37. "'Banking game' means a game in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play." FLA. STAT. § 849.086(b) (2009). See *infra* Part II.B. for a discussion of "banked" games in Florida.

38. Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419, 428 (2009).

39. Fla. House of Representatives v. Crist, 999 So. 2d 601, 604 (Fla. 2008) (emphasis altered) (citing 25 U.S.C. § 2710(d)(1) (2006)).

40. *Id.*

41. *Id.* (quoting 25 U.S.C. § 2710(d)(3)(A) (2006)).

42. *Id.* (citing 25 U.S.C. § 2710(d)(3)(B) (2006)).

43. Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 324 (2004–2005); *see* Monaghan, *supra* note 33, at 109. "If the court finds the state negotiated in good faith, the tribe's proposal fails." Texas v. United States, 497 F.3d 491, 494 (5th Cir. 2007). If the court finds the state lacked good faith, however, the court may order negotiation, then mediation. *Id.* "If the state ultimately rejects a court-appointed mediator's proposal, the Secretary 'shall prescribe, in consultation with the Indian tribe, procedures . . . under which [C]lass III gaming may be conducted.'" *Id.* (quoting 25 U.S.C. § 2710(d)(7)(B) (2006)).

44. 517 U.S. 44, 47 (1996).

45. *Crist*, 999 So. 2d at 604 (citing *Seminole Tribe*, 517 U.S. at 47). For a discussion of *Seminole Tribe's* effect on a tribe's bargaining power in tribal-state compacting negotiations, see *infra* Part IV.C.2.

To work around the Court's decision in *Seminole Tribe* and to provide a remedy to tribes, the Secretary promulgated regulations (Secretarial Procedures) that allowed the Secretary to issue administrative rules governing Class III gaming.[46] In the event a state asserts its sovereign immunity and refuses to consent to a tribe's suit, a tribe may petition the Secretary for a framework to regulate Class III gaming activities.[47] The Secretary has sixty days "to examine a tribe's proposal [to determine] if it meets the statutory criteria including whether the proposal is consistent" with IGRA and whether the state "permits such gaming."[48] During that same period, the state's governor and attorney general are invited to review the proposal and offer an alternative proposal.[49] If the state does not submit an alternative proposal, the Secretary will review the tribe's proposal and either approve or disapprove it.[50] On the other hand, if the state submits an alternative proposal, the Secretary appoints a mediator who will select a proposal using the procedures IGRA prescribes.[51] Ultimately, the Secretary has the final administrative authority to approve or disapprove the proposals.[52]

46. *Texas*, 497 F.3d at 494; Light & Rand, *supra* note 1, at 432 (citation omitted).

47. *Crist*, 999 So. 2d at 604–05 (citation omitted). For a detailed overview of the Secretarial Procedures see Michael E. Wheeler, *One White Buffalo, Why not Three?: Native American Gaming in the Lone Star State*, 26 MISS. C. L. REV. 147, 152–53 (2006–2007). At least one circuit court has held that the Secretary lacked the authority to issue the Secretarial Procedures. *Crist*, 999 So. 2d at 605 (citing *Texas*, 497 F.3d at 493). For a detailed analysis of *Texas v. United States* and its impact on tribal-state compacting see *infra* Part IV.

48. Complaint at 6, Seminole Tribe of Fla. v. United States, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317); *see also Texas*, 497 F.3d at 494.

49. *Texas*, 497 F.3d at 494–95; *see* Wheeler, *supra* note 47, at 153.

50. "If the state does not submit an alternative proposal, the Secretary reviews the tribe's proposal and either approves it or offers the opportunity for a conference between the state and the tribe to address 'unresolved issues and areas of disagreements in the proposal.'" *Texas*, 497 F.3d at 494 (quoting 25 C.F.R. § 291.8(b)(2) (2008)). The Secretary then must make a "'final decision either setting forth the Secretary's proposed Class III gaming procedures for the Indian tribe, or disapproving the proposal.'" *Id.* at 494–95 (quoting 25 C.F.R. § 291.8).

51. *Id.* at 495 (citing 25 C.F.R. §§ 291.9–291.10 (2008)); Wheeler, *supra* note 47, at 153.

52. Wheeler, *supra* note 47, at 153 (citing 25 C.F.R. § 291.8(c) (2008)). The State can object to the mediator's proposal, in which case the Secretary will make the ultimate decision. *Texas*, 497 F.3d at 495. In the event the Secretary rejects the mediator's proposal, the Secretary is to prescribe procedures that comport with the mediator's selected version as much as possible, as well as with IGRA and state law. Alabama v. United States, No. 08-0182-WS-C, 2008 WL 5071904, at *2 (S.D. Ala. Nov. 24, 2008).

B. *Betting Limits: Federal Gaming Law and Florida's Gaming Laws*

Pursuant to federal law, state gaming laws apply on tribal lands absent a tribal-state compact.[53] Therefore, "what is legal in Florida is legal on tribal lands, and what is illegal in Florida is illegal there. Absent a compact, any gambling prohibited in the state is prohibited on tribal land."[54]

Florida permits limited forms of Class III gaming.[55] For example, Florida's Constitution authorizes the state lottery[56] and slot machines in Broward and Miami-Dade counties.[57] Florida also permits and regulates pari-mutuel wagering on jai alai and dog and horse racing.[58] Moreover, the State expressly authorizes cardroom gaming, including, among other games, poker, rummy, hearts, bridge, and dominos in which "the winnings of any player in a single round, hand, or game do not exceed $10 in value."[59] Furthermore, the State "permits and profits from a vast gaming cruise industry through 'cruises to nowhere,' which operate out of many Florida ports."[60] These cruises offer "the full range of casino games" including slot machines and table games.[61]

Notwithstanding the preceding, Florida "prohibits all other types of Class III gaming."[62] Florida law distinguishes "nonbanked" games from "banked" games.[63] A "banked" game is a type of Class III gaming "'in

53. Fla. House of Representatives v. Crist, 999 So. 2d 601, 614 (Fla. 2008) (citing 18 U.S.C. § 1166(a) (2006)).

54. *Id.*

55. *Id.*

56. *Id.* (citing FLA. CONST. art. X, §§ 7, 15). The State Lottery Department operates "an almost unlimited range of gaming activities, including card and casino games." *Intergovernmental Gaming Agreement Act: Hearing on S. 985 Before the S. Comm. on Indian Affairs*, 106th Cong. 53 (1999) (statement of James E. Billie, Chairman, Seminole Tribe of Florida) [hereinafter Statement of Billie]. For instance, the State Lottery Department has previously conducted games which "mimic traditional card and casino gaming" including "a house-banked hi-low card game, a wheel game similar to roulette, and a dice game similar to craps." *Id.* The State Lottery Department also operates devices, such as "Instant Ticket Vending Machines," which fall within the State's definition of "slot machine." *Id.*

57. *Crist*, 999 So. 2d at 614 (citing FLA. CONST. art. X, §§ 7, 15).

58. *Id.* (citing FLA. STAT. §§ 550.001–.913 (2007)); *see* Statement of Billie, *supra* note 56, at 54 (noting Florida's allowance and regulation of "a broad range of pari-mutuel and simulcast activity[]"). "'Pari-mutuel' means a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes." FLA. STAT. § 550.002(22).

59. *See* FLA. STAT. § 849.085 (2007); Statement of Billie, *supra* note 56, at 53 (discussing the five types of gaming that Florida law permits the Seminole Tribe to operate).

60. Statement of Billie, *supra* note 56, at 54.

61. Statement of Billie, *supra* note 56, at 54.

62. *Crist*, 999 So. 2d at 614; *see* FLA. STAT. §§ 849.01–849.46.

63. *Crist*, 999 So. 2d at 614 (footnote omitted).

which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play.'"[64] In contrast, a "nonbanked" game is a form of Class II gaming in which participants play against each other rather than against the house.[65] While Florida law permits "nonbanked" games, it expressly prohibits "banked" card games.[66] Therefore, absent a valid tribal-state compact that permits "banked games," such games are illegal on tribal lands in Florida.

C. *Not a Sure Bet: Sixteen Years of Compact Negotiations*

The Tribe first sought to negotiate a Class III gaming compact in January of 1991.[67] In September of that year, the Tribe requested the State to enter into good faith compact negotiations pursuant to IGRA.[68] The negotiations were unsuccessful and later that year, the Tribe filed suit against the State alleging the State failed to negotiate a compact in good faith.[69] The State asserted Eleventh Amendment immunity, and the suit was dismissed.[70]

Over the next several years, the Tribe continually submitted proposals to the Secretary to establish Class III gaming procedures.[71] Finally, in 1999, one of the Tribe's proposals was deemed to meet the regulations of the Department of the Interior (Department).[72] Shortly thereafter, the Secretary held an informal conference between the Secretary, the Tribe, and the State.[73] At the State's suggestion, however, the conference was temporarily suspended.[74]

In 2001, more than a year after the informal conference, the Secretary finally issued a decision on the scope of gaming permitted in Florida.[75] In that decision, the Secretary allowed the tribe to offer a wide range of

64. *Id.* (citing FLA. STAT. § 849.086(2)(b)). Examples of "banked" card games include blackjack, baccarat, and *chemin de fer*. *Id.*

65. Petition for Writ of Quo Warranto at 5, *Crist*, 999 So. 2d 601 (No. SC07-2154).

66. *Crist*, 999 So. 2d at 614 (citing FLA. STAT. §§ 849.086(12)(a), (15)(a)).

67. *Id.* at 605. The negotiations between the Seminole Tribe and the State have spanned sixteen years and four different governors. *Id.*

68. Complaint at 4, Seminole Tribe of Fla. v. United States, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317).

69. *Crist*, 999 So. 2d at 605.

70. *Id.* (citing *Seminole Tribe*, 517 U.S. 44, 47 (1996)).

71. *Id.* at 605.

72. Complaint at 6, Seminole Tribe of Fla. v. United States, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317).

73. *Id.* at 7.

74. *Crist*, 999 So. 2d at 605.

75. Complaint at 7, Seminole Tribe of Fla. v. United States, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317).

Class III games.[76] Approximately five months later, however, without any notice to the Tribe, the Secretary withdrew the decision "in order to evaluate the important issues raised in this matter."[77] The delay continued for more than five years.[78] Finally, in 2006, the Secretary reconvened the conference and warned that if the Tribe and the State did not reach an agreement within sixty days, the Department would issue Class III gaming procedures.[79]

Six months later, with no progress made, the Tribe sued the Department in federal court.[80] The Department then warned the governor to negotiate a compact with the Tribe by November 15, 2007, or the Department would issue procedures.[81] On November 14, 2007, one day before the deadline, Governor Crist entered into the Compact with the Tribe.[82]

D. *Upping the Ante: Florida Claims the Compact is Invalid*

Five days after Governor Crist entered into the Compact with the Tribe, the House of Representatives and its Speaker[83] filed a petition to the Florida Supreme Court "disputing the Governor's authority to bind the State to the Compact without legislative authorization or ratification."[84] The Florida Supreme Court held that Governor Crist lacked the authority to bind the State to the Compact because it contradicted state law.[85] The court reasoned the governor did not have the constitutional authority to bind the State to a gaming compact that "clearly departs from the State's public policy by legalizing types of gaming that are illegal everywhere else in the state."[86] Notably, however, the court did not resolve whether the Compact violated IGRA.[87] The court only decided the narrower issue of

76. *Id.*

77. *Id.* at 8.

78. *Crist*, 999 So. 2d at 605.

79. *Id.*

80. *Id.* (citing Complaint, Seminole Tribe of Fla. v. United States, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317)).

81. *Id.* "Under the proposed procedures, the State would not receive any revenue and would have no control over the Tribe's gaming operations." *Id.* The Tribe would have been able to operate Class III games such as slot machines and card games. *Id.* The procedures, however, "would *not* have permitted the Tribe to operate banked card games . . . ." *Id.* (footnote omitted).

82. *Id.* at 606.

83. When the petition was filed, the Speaker of the Florida House of Representatives was Republican Marco Rubio. Florida House of Representatives, Marco Rubio http://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4180&SessionId=54 (last visited Oct. 12, 2009).

84. *Crist*, 999 So. 2d at 606.

85. *Id.* at 612, 616.

86. *Id.* at 603. "The Governor does not have authority to agree to legalize in some parts of the state, or for some persons, conduct that is otherwise illegal throughout the state." *Id.* at 613.

87. *Id.* at 615.

whether the Florida Constitution granted the governor the authority to bind Florida to a compact that violated the State's public policy.[88]

III. FOLD OR HOLD? AN ANALYSIS OF THE COMPACT'S VALIDITY UNDER IGRA

As noted above, according to IGRA, Class III gaming activities are lawful on Indian lands if those activities are: (1) authorized by a tribal ordinance; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (3) "conducted in accordance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect."[89] Pursuant to IGRA, the terms of a compact cannot, under any circumstances, contradict a state's expressed laws.[90] Accordingly, to determine whether this Compact violates IGRA, one must resolve whether the gaming activities authorized by the Compact contradict Florida's laws, or as IGRA states, whether Florida "permits such gaming for any purpose by any person, organization, or entity."[91]

Attempts to interpret the "permits such gaming" provision have garnered a great deal of litigation[92]—so much so, that a circuit split exists regarding the proper interpretation of the phrase.[93] Notably, in rendering its decision, the Florida Supreme Court failed to interpret IGRA's "permits such gaming" provision under Florida law.[94] Notwithstanding, this Note concludes that Florida does not "permit[] such [Class III] gaming," and therefore, the Compact provisions authorizing Class III games contradict Florida law. As a result, the Compact fails to meet one of IGRA's requirements and is therefore invalid under IGRA.[95]

A. *A Roll of the Dice: The Circuit Split on the Interpretation of "Permits Such Gaming"*

As stated above, a circuit split exists regarding the interpretation of the phrase "permits such gaming."[96] The interpretation of the phrase hinges on whether courts decide state law *prohibits* Class III gaming or whether state

88. *Id.*

89. *Id.* at 604 (emphasis omitted) (quoting 25 U.S.C. § 2710(d)(1) (2006)); *see supra* Part II.A.

90. *Crist*, 999 So. 2d at 612.

91. *See* 25 U.S.C. § 2710(d)(1)(B).

92. *Crist*, 999 So. 2d at 615.

93. *See infra* Part III.A.

94. *Crist*, 999 So. 2d at 615.

95. *See* Letter from McCollum, *supra* note 19 (noting "the Compact is invalid, . . . [and] [C]lass III gaming on Indian lands [is] illegal").

96. Melissa S. Taylor, Comment, *Categorical vs. Game-Specific: Adopting the Categorical Approach to Interpreting "Permits Such Gaming,"* 43 TULSA L. REV. 89, 90 (2007).

law merely *regulates* Class III gaming.[97] The U.S. Supreme Court established this regulatory-prohibitory distinction in *California v. Cabazon Band of Mission Indians*.[98] According to the Court, "if the intent of a state law is generally to prohibit certain conduct," it falls within the state's grant of criminal jurisdiction over Indian lands; "but if the state law generally permits the conduct at issue, subject to regulation," it does not fall within the state's authority over regulation on Indian lands.[99] The Court noted that in order to enforce state laws on tribal lands, a court must determine "whether the law is criminal in nature, and thus fully applicable to" tribal land, or civil in nature, and therefore not applicable to tribal land.[100] The Court cautioned that the mere fact "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law."[101]

The Senate Report accompanying IGRA also provided insight regarding the meaning of the phrase "permits such gaming."[102] The Report noted that courts should distinguish between state criminal laws that prohibit gaming activities and state civil laws that regulate gaming activities to determine whether a state "permits such gaming."[103]

Circuit courts have taken two distinct approaches to interpreting this controversial phrase.[104] The Second Circuit adopts the "categorical" approach[105] while the Eighth and Ninth Circuits adopt the "game-specific" approach.[106] Under the "categorical" approach, a tribe can offer Class III games if the state permits any Class III game to be conducted in the

97. *See* PPI, Inc. v. Kempthorne, No. 4:08CV248(SPM), 2008 WL 2705431, at *2 n.2 (N.D. Fla. July 8, 2008).

98. 480 U.S. 202 (1987).

99. *Id.* at 209.

100. *Id.* at 208.

101. *Id.* at 211.

102. Seminole Tribe of Fla. v. Florida, No. 91-6756, 1993 WL475999, at *6 (S.D. Fla. Sept. 22, 1993) (quoting S. REP. No. 100-446, at 7 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3076).

103. *Id.* While the Senate Report referred to the phrase in the context of Class II gaming activities, the identical phrase is repeated regarding Class III activities. *Id.* (citing 25 U.S.C. § 2710(d)(1)(B) (2006)). Generally, when a "phrase is used in more than one section of an act, and the meaning is clear as used in one place, 'it will be construed to have the same meaning in the next place.'" *Id.* (quoting United States v. Nunez, 573 F.2d 769, 771 (2d Cir. 1978)). Therefore, the "legislative history relating to the phrase as found in the provision governing Class II gaming is instructive regarding the meaning of the language found in the provision governing Class III gaming." *Id.*

104. *See* Taylor, *supra* note 96, at 99.

105. *Id.* (citing Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031–32 (2d Cir. 1990)).

106. *Id.* (citing Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 278–79 (8th Cir. 1993), Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1257–58 (9th Cir. 1994)).

state.[107] The theory behind the "categorical" approach is that the state is "regulating" rather than prohibiting Class III gaming.[108] For example, "[u]nder this interpretation, if a tribe wants to offer roulette, a [C]lass III game, it must only ensure the state offers some other game considered a [C]lass III game such as poker or pari-mutuel wagering on horse racing."[109]

In *Mashantucket Pequot Tribe v. Connecticut*,[110] the Second Circuit Court of Appeals took the "categorical" approach and ruled the state must negotiate with the Tribe concerning Class III gaming activities.[111] Connecticut law allowed various Class III games, including blackjack, poker, roulette and baccarat;[112] however, these activities were limited to fund-raising purposes.[113] The court concluded the Class III gaming at issue did not violate the state's public policy because Connecticut allowed Class III games, even though they were highly regulated.[114] Therefore, "such gaming is not totally repugnant to the State's public policy[,]" and Connecticut regulates rather than prohibits Class III gaming.[115]

Wisconsin also adopted the "categorical" approach. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,[116] the tribes wanted to include Class III gaming, including blackjack, poker, craps, and roulette in a compact.[117] Wisconsin law only permitted lotteries and pari-mutuel wagering.[118] The court reasoned that because Wisconsin permits some Class III gaming, the state is regulating the activity rather than prohibiting it.[119] The court determined that the state "permits such gaming" under IGRA because Wisconsin "does not, as a matter of criminal law and public policy, *prohibit* such gaming activity."[120] The court further reasoned "if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be . . . regulatory and it is barred from" state regulation.[121]

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107. PPI, Inc. v. Kempthorne, No. 4:08CV248(SPM), 2008 WL 2705431, at *2 n.2 (N.D. Fla. July 8, 2008) (citing N. Arapaho Tribe v. Wyoming, 389 F.3d 1308, 1311 (10th Cir. 2004)); *see* Taylor, *supra* note 96, at 90.

108. *PPI*, 2008 WL 2705431, at *2 n.2 (citing *N. Arapaho*, 389 F.3d at 1311).

109. Taylor, *supra* note 96, at 90 (footnote omitted).

110. 913 F.2d 1024 (2d Cir. 1990).

111. *Id.* at 1031–32.

112. *Id.* at 1026 n.5.

113. *Id.* at 1029.

114. *Id.* at 1031.

115. *Id.* at 1031–32.

116. 770 F. Supp. 480 (W.D. Wis. 1991).

117. *Id.* at 483.

118. *Id.*

119. *Id.* at 486–87.

120. *Id.* at 486 (emphasis in original).

121. *Id.* at 485.

On the other hand, under the "game-specific" approach, taken by the Eighth and Ninth Circuits, a tribe can only offer a certain Class III game "if the state expressly allows that game 'for any purpose.'"[122] Under this approach, courts must determine whether state law permits the specific game at issue.[123] The theory underlining the "game-specific" approach is that games not expressly permitted are prohibited by the state.[124] Also under this approach, if the state entirely prohibits a particular game, the state does not "permit such gaming" even if the state permits other games in the same category.[125] "[T]he state's permissive treatment as to one type of Class III game does not mean that the state must negotiate with tribes as to all Class III games."[126] To illustrate, if a tribe wishes to offer blackjack, a Class III game, it must explicitly allow some organization to offer blackjack for any purpose.[127]

In *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,[128] several tribes sued the Governor of California because the state refused to negotiate over the inclusion of Class III gaming, including "banked" card games.[129] California law allowed for some Class III gaming including video lottery terminals and pari-mutuel horse racing,[130] however, California law expressly prohibited the operation of "banked" card games as well as slot machines.[131] The Ninth Circuit Court of Appeals reasoned California law did not permit "banked" games despite the fact that California law permitted games that "share[d] some characteristics with banked" card games.[132] The court noted, "IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming."[133] A state is only required to permit tribes to operate games that others are permitted to operate, not "give tribes what others cannot have."[134]

Similar to *Rumsey*, in *Cheyenne River Sioux Tribe v. South Dakota*,[135] a tribe sued the state for failure to negotiate with the tribe over the inclusion

122. Taylor, *supra* note 96, at 90 (quoting N. Arapaho Tribe v. Wyoming, 389 F.3d 1308, 1311 (10th Cir. 2004).

123. *N. Arapaho*, 389 F.3d at 1311.

124. PPI, Inc. v. Kempthorne, No. 4:08CV248(SPM), 2008 WL 2705431, at *2 n.2 (N.D. Fla. July 8, 2008) (citing *N. Arapaho*, 389 F.3d at 1311).

125. *N. Arapaho*, 389 F.3d at 1311.

126. *Id.*

127. *See* Taylor, *supra* note 96, at 90 (footnote omitted).

128. 64 F.3d 1250 (9th Cir. 1994).

129. *Id.* at 1255.

130. *Id.* at 1256.

131. *Id.* (citing CAL. PENAL CODE ANN §§ 330–330(b) (West 2009)).

132. *Id.* at 1258.

133. *Id.*

134. *Id.* (footnote omitted).

135. 3 F.3d 273 (8th Cir. 1993).

of Class III gaming, specifically traditional keno.[136] South Dakota law allowed for certain types of Class III gaming including lotteries, limited card games, slot machines, pari-mutuel horse and dog racing, and video keno.[137] The Eighth Circuit Court of Appeals affirmed the lower court's reasoning that video keno and traditional keno are not the same game and South Dakota law did not permit traditional keno.[138] The court reasoned IGRA does not require the state to negotiate with respect to forms of gaming it does not permit.[139] "Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal . . . for the tribe to offer traditional keno . . . ."[140] Ultimately, the court held the state did not have to negotiate with the tribe regarding the tribe's operation of traditional keno.[141]

A Florida federal district court has also addressed the interpretation of the phrase "permits such gaming" under Florida law.[142] In *Seminole Tribe of Florida v. Florida*,[143] the Tribe sued the State for failing to negotiate in good faith regarding certain forms of Class III gaming.[144] In its ruling, the court took the "game-specific" approach, holding "IGRA does not require all Class III gaming activities to be included in compact negotiations merely because the State permits specific Class III gaming activities in some form."[145] The court reasoned the State's permission of specific Class III gaming activities does not subject all Class III gaming activities to negotiation.[146] Although one Florida federal court has taken the "game-specific" approach to the phrase "permits such gaming," the Florida Supreme Court and the Eleventh Circuit Court of Appeals have not ruled on the interpretation of this language.[147] The U.S. Supreme Court has stated, however, that "[t]he shorthand test is whether the conduct at issue violates the State's public policy."[148]

136. *Id.* at 275, 278.
137. *Id.* at 276.
138. *Id.* at 277, 281.
139. *Id.* at 279.
140. *Id.*
141. *Id.*
142. Seminole Tribe of Fla. v. Florida, No. 91-6756, 1993 WL 475999, at *5–6 (S.D. Fla. Sept. 22, 1993).
143. *Id.* at *1.
144. *Id.*
145. *Id.* at *17.
146. *Id.* at *6.
147. Crist Response, *supra* note 20.
148. Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

B. *Flush or Flop? Does Florida "Permit Such Gaming"?*

In response to the court's ruling in *Florida House of Representatives v. Crist*, the Tribe filed a motion for rehearing encouraging the court to take a "categorical" approach to the "permits such gaming" language under IGRA.[149] The Tribe argued that the State, through certain exceptions in Florida law, "is authorized to conduct extensive forms of gambling—including banked card games," and therefore, Florida "permits such gaming" under IGRA.[150] The Tribe alleged that because Florida allows "banked" card games through the state lottery and Class III slot machines in Broward County, the State is regulating the games rather than prohibiting them.[151] Accordingly, once Florida permitted banked card games, the State "was foreclosed from imposing a policy that prohibited banked card games or Class III slots on any tribal lands in the state."[152]

IGRA plainly states, however, that Class III gaming is not permitted in jurisdictions where specific Class III gaming activities are explicitly forbidden by criminal law.[153] Therefore, regardless of which approach courts take, "categorical" or "game-specific," the phrase "permits such gaming" cannot possibly permit what is explicitly prohibited under state criminal law.[154] Accordingly, if a type of Class III gaming is explicitly "illegal in a state, that type of gaming may not lawfully be included in a compact pursuant to IGRA."[155]

A close reading of cases that considered the *Cabazon* regulatory-prohibitory distinction in relation to IGRA supports this proposition.[156] In *Mashantucket Pequot Tribe* and *Lac du Flambeau Band of Lake Superior Chippewa Indians*, where the courts permitted tribes to operate certain Class III games, the courts "determined that the *specific gaming activity* proposed by the Indian tribe was in fact permitted by the state[]" and was

149. *See, e.g.*, The Seminole Tribe of Florida's Motion for Rehearing at 8–9, Fla. House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008) (No. SC07-2154).

150. *Id.* at 2 (footnote omitted).

151. *Id.* at 8.

152. *Id.*

153. *See* 25 U.S.C. § 2701(5) (2006) ("Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is . . . conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

154. *Crist*, 999 So. 2d at 615 (noting that "IGRA . . . makes it unlawful for Tribes to operate particular Class III games that State law completely and affirmatively prohibits." (quoting 63 Fed. Reg. 3289, 3293 (Jan. 22, 1998))).

155. Crist Response, *supra* note 20, at 13; *see* Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir. 1994) (noting that "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have" (footnote omitted)).

156. *See Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at *7 (S.D. Fla. Sept. 22, 1993).

not expressly prohibited by state law.[157] On the other hand, in *Rumsey* and *Cheyenne River Sioux Tribe*, where the courts prohibited the tribes from offering certain Class III games, the courts found there were no state laws that permitted the Class III games at issue.[158]

As noted above, Florida criminal law affirmatively prohibits "banked" card games.[159] The Tribe does not dispute this; however, it claims that Florida law contains multiple exceptions to this prohibition and therefore, "banked" games are not totally repugnant to Florida's public policy.[160] Accordingly, the Tribe argues because Florida allows "banked" games in other capacities, the State is regulating the games rather than prohibiting them.[161] As a result, the Tribe argues the State cannot forbid the operation of Class III games on tribal lands.[162]

The Tribe asserts a facially strong argument. Recall that Florida's criminal law prohibiting "banked" games is not absolute nor without exceptions.[163] Florida's exceptions to its general prohibition on "banked" card games may demonstrate Florida has a broader public policy of tolerating Class III gaming on Indian lands.[164] In expressly prohibiting specific forms of Class III gaming, however, the Florida Legislature has demonstrated it is unwilling "to allow all but a few forms of Class III

157. *Id.* For instance, in *Mashantucket Pequot Tribe*, a Connecticut statute permitted the operation of the specific forms of Class III gaming in question. *Id.*; *see supra* notes 105–10 and accompanying text. Likewise, in *Lac du Flambeau*, the court concluded that Wisconsin did not prohibit games involving prize, chance, and consideration. *Seminole Tribe of Fla.*, 1993 WL 475999, at *8. Therefore the ruling allowing the tribes to negotiate over certain types of Class III games "was limited to the specific category of games . . . [not expressly] prohibited by Wisconsin [law]." *Id.*

158. *See Rumsey*, 64 F.3d at 1256 (citing CAL. PENAL CODE § 330 (West 2009) (stating that California law expressly prohibited the operation of "banked" card games as well as slot machines as a misdemeanor offense)); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 277 (8th Cir. 1993) (noting South Dakota law does not permit traditional keno).

159. *See supra* Part II.B (discussing Florida's gaming laws); *see also* FLA. STAT. § 849.08 (2009) ("Whoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree . . . ."); *Id.* § 849.086(12)(a) ("No person . . . may conduct any banking game or any game not specifically authorized by this section."); *Id.* § 849.11 (noting "[w]hoever sets up, promotes or plays at any game of chance . . . or any other gambling device whatever for, or for the disposal of money or other thing of value . . . shall be guilty of a misdemeanor of the second degree . . . ."); *Crist*, 999 So. 2d at 614 (noting blackjack, baccarat, and chemin de fer are banked card games and, therefore, are illegal in Florida).

160. The Seminole Tribe of Florida's Motion for Rehearing at 3, 4, Fla. House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008) (No. SC07-2154) (footnote omitted).

161. *Id.* at 8 (citing N. Arapaho Tribe v. Wyoming, 389 F.3d 1308, 1312 (10th Cir. 2004)).

162. *Id.*

163. *See supra* Part II.B (discussing Florida's gaming laws).

164. *See Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at *9 (S.D. Fla. Sept. 22, 1993) (quoting Mashantucket Pequot Tribe v. Connecticut, 913 F.2d, 1024, 1031 (2d Cir. 1990) (noting the Class III gaming was "not totally repugnant to" the state's public policy)).

activities and those which are allowed are subject to strict regulation."[165] Just because the State permits individual Class III gaming activities does not mean the State's public policy permits all Class III activities.[166] As a result, Florida's overall public policy regarding the prohibition of Class III gaming is not affected by a few limited exceptions. Therefore, because the Compact permits the Tribe to operate games that are otherwise illegal under Florida law, the Compact clearly violates Florida's public policy, thereby failing the Supreme Court's public policy test.

In conclusion, the Compact provisions permitting the Tribe to operate Class III games completely override Florida criminal law and violate Florida's public policy. As a result, the Compact violates IGRA by authorizing "banked games that are criminally prohibited in Florida."[167] In other words, because Florida does not "permit such gaming" the Compact fails to meet one of the requirements of IGRA, thereby violating IGRA and theoretically rendering the Compact void.[168]

C. *Game Breaker? The Complication of the Secretary's Approval of the Compact*

Although the Compact violates state law and is theoretically void, the Secretary approved the Compact and provided notice in the Federal Register.[169] As a general rule, once the Secretary approves a compact and publishes notice in the Federal Register, it goes into effect.[170] The validity of a compact under state law, however, is a separate and distinct

165. *Id.* at *10. The Florida penal code prohibits a broad range of gambling activities. *Id.* (citing FLA. STAT. § 849.08 (2009)). Certain games, however, which would otherwise be Class III games, are exempted from this statutory scheme. *Id.*; *see supra* text accompanying note 146. However, these instances are limited and do not affect the overall public policy of the state to prohibit Class III gaming. *Seminole Tribe of Fla.*, 1993 WL 475999, at *9.

166. *Id.* at *8.

167. Petitioners' Reply in Support of a Writ of Quo Warranto at 1, Fla. House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008) (No. SC07-2154). A compact that is invalid under state law is invalid under IGRA. *See, e.g.*, Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1554 (10th Cir. 1997) (holding compact approved by Secretary of the Interior was invalid because the compact was not properly "entered into" under state law and therefore was not in effect under the requirements of IGRA); Narragansett Indian Tribe of R.I. v. Rhode Island, No. 94-0618, 1996 WL 97856, at *2 (D.R.I. Feb. 13, 1996) (holding that a compact signed by the governor, who lacked authority under state law to sign the compact, is void under IGRA and has no legal effect); Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 46 (D.D.C.1993) (holding because the governor did not have authority to sign the compact, the compact does not comply with IGRA and is invalid), *rev'd*, 43 F.3d 1491 (D.C. Cir. 1995).

168. IGRA states a compact is in effect "only to the extent the compact is consistent with [IGRA]." 25 U.S.C. § 2710(d)(8)(C) (2006).

169. *See Crist*, 999 So. 2d at 606 (noting "[o]n January 7, 2008, upon publication of the Secretary's approval, the Compact went into effect").

170. *Pueblo of Santa Ana*, 104 F.3d at 1553 (citing 25 U.S.C. § 2710(d)(3)(B) (2006)).

requirement from the Secretary's approval.[171] The Secretary cannot, "by his approval, give life to a compact which was void from its inception."[172] If a compact is invalid under state law, the compact should be rendered "void, and the subsequent approval of the compact[] and publication of notice in the Federal Register [does not] give life to the void compact[]."[173]

IGRA imposes two individual requirements before Class III gaming is authorized: "[T]he State and the Tribe must have 'entered into' a compact *and* the compact must be 'in effect' pursuant to Secretarial approval."[174] The "entered into" language under IGRA is a separate requirement.[175] Therefore, "the compact must be validly entered into by a state before it can go into effect, via Secretarial approval, under IGRA."[176]

Because the Class III gaming permitted under the Compact between the State of Florida and the Tribe is unlawful in Florida, the Compact was never validly "entered into" and was not automatically in effect upon approval by the Secretary.[177] The notice in the Federal Register "does not authorize illegal gaming and will not buttress a void compact."[178] Therefore, because the Florida Supreme Court determined the Compact violated state law, "the [invalid C]ompact is not entered into and the publication does not authorize Class III gaming."[179] Despite the apparent invalidity of the Compact, however, the Tribe continues to operate Class III games in several of its casinos throughout Florida.[180]

IV. WHAT'S IN THE CARDS FOR INDIAN GAMING IN FLORIDA?

A. *All Bets Are Off: No Resolution in Sight*

Even though the Compact is in direct violation of state law, and thus, invalid under IGRA, Seminole casinos throughout Florida continue to operate illegal Class III games.[181] In the meantime, the State and other interested third-parties have grappled with how to stop the Tribe from

171. *Id.* at 1554 (citations omitted).

172. *Id.* at 1548.

173. *Id.* at 1553.

174. *Id.*

175. *Id.* at 1555.

176. *Id.* (footnote omitted).

177. John Holland, *Odds Favor Seminoles, Despite Compact Ruling*, S. FLA. SUN-SENTINEL, Sept. 16, 2008, at B1, *available at* 2008 WLNR 17572989.

178. *Id.*

179. Letter from McCollum, *supra* note 19.

180. *Id.*; *see also* Fla. House of Representatives v. Crist, 999 So. 2d 601, 608 (Fla. 2008) (noting that the Tribe "has begun offering blackjack and other games at the Seminole Hard Rock Hotel and Casino").

181. Letter from McCollum, *supra* note 19.

operating the illegal games.[182] In the wake of the court's decision in *Florida House of Representatives v. Crist*, several attempts were made to halt the illegal gambling, all of which proved unsuccessful.[183] Specifically, the State of Florida was unable to stop the illegal Class III gambling because it possesses no compulsory authority over the activities on Indian lands.[184] As Florida Attorney General Bill McCollum noted: "Florida [is] in the untenable position of having a tribal gaming operation, which everyone acknowledges is unauthorized, ongoing without the jurisdiction to stop the illegal gaming activities."[185] Additionally, the Tribe's sovereign immunity, together with the compulsory joinder rule,[186] prevented interested third-parties from halting the Tribe's operation of the illegal games.[187] For example, the Pompano Harness Racing Track in Pompano Beach, Florida (PPI), a competing pari-mutuel facility,[188] sought a judgment setting aside the Department's action approving the Compact, a judgment declaring the Compact invalid under IGRA, and a permanent injunction enjoining implementation of the Compact provisions.[189] The Tribe's sovereign immunity prevented PPI from joining the Seminole Tribe to the action.[190] The district judge denied PPI's motion, finding that the Tribe is an indispensible party to the action and must be joined to the suit

182. *See* Holland, *supra* note 177 ("The situation is very uncertain because there's no obvious road map on what happens next. . . . [Although] everyone admits there's no valid compact[,] . . . there's no blueprint on how to unwind the clock and get back to where we were before the governor reached the agreement." (quoting attorney Carlos Muniz, who worked on House Speaker Marco Rubio's successful Supreme Court challenge)).

183. *See infra* notes 181–87 and accompanying text.

184. "The State has no regulatory jurisdiction over conduct occurring on Indian lands," and "gaming on sovereign Indian lands is governed exclusively by federal law." Crist Response, *supra* note 20, at 33; *see* Texas v. United States, 497 F.3d 491, 493 (5th Cir. 2007) (noting "[a]s sovereigns, Indian tribes are subordinate only to the federal government." (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987))); PPI, Inc. v. Kempthorne, No. 4:08CV248(SPM), 2008 WL 2705431, at *2 (N.D. Fla. July 8, 2008) (noting "[u]nless otherwise agreed in an approved compact, prosecution of state gambling laws remains within the exclusive jurisdiction of the federal government").

185. *See* Letter from McCollum, *supra* note 19.

186. Rule 19 of the Federal Rules of Civil Procedure requires joinder of a party when a court determines the party is necessary to the action. FED. R. CIV. P. 19.

187. *See PPI, Inc.*, 2008 WL 2705431, at *3–4.

188. PPI is authorized by the state of Florida "to offer pari-mutuel wagering, poker, and slot machines at its . . . facility [but] is prohibited by Florida law to operate any other type of gaming activities." *Id.* at *1.

189. *Id.* PPI contended it would suffer "irreparable injury through the loss of competitive standing, customer good will, and revenue, because its customers will be diverted to the banked card games that are offered by the Seminole Tribe." *Id.*

190. *Id.* at *3. "It is well-established that Indian tribes have immunity from suit in federal, state, and tribal courts." Fletcher, *supra* note 1, at 12 (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 753–54 (1998)).

under Rule 19 of the Federal Rules of Civil Procedure because it has a significant interest in the outcome of the litigation.[191] The court acknowledged that "[a]lthough there is no alternative forum for PPI to litigate its claim, in equity and good conscience this case cannot proceed without the Seminole Tribe."[192]

To make matters worse, the only authority with the power to stop the illegal gaming activities—the federal authorities—decided not to intervene, giving the State and the Tribe "the opportunity to work out their differences."[193] Finally, however, after nearly a year following the Florida Supreme Court's decision in *Florida House of Representatives v. Crist*, the Florida Legislature presented the Tribe with the Proposed Compact, in hopes of bringing closure to Florida's gaming crisis.

B. *The Final Stretch: The State's Proposed Solution to Florida's Gaming Crisis and the Tribe's Response*

Approximately a year and a half after the execution of the original Compact, the Florida Legislature passed the Proposed Compact that effectively set the parameters for a new compact between the State and the Tribe.[194] Although the Proposed Compact authorized the governor to negotiate a new compact with the Tribe for the purpose of operating Class III games, the Proposed Compact specified the requirements and minimum standards for the compact and required legislative ratification.[195] Notably, the Proposed Compact's terms were not as favorable to the Tribe as the terms of the original Compact. For example, the Proposed Compact increased the annual payments the Tribe must make to the State; yet it decreased the number of casinos at which the Tribe is permitted to operate Class III games.[196] Specifically, under the guidelines of the Proposed Compact, the State would give the Tribe the exclusive right to offer blackjack and other banked games at its existing four casinos located in Broward and Hillsborough Counties.[197] In return, the Tribe would be expected to make an initial payment to the State of $600 million.[198] The Tribe would then pay the State at least $150 million per year over the next

191. *PPI, Inc.*, 2008 WL 2705431, at *3 (noting "the Seminole Tribe is a necessary party to this action because it has an interest in the [C]ompact and it is conducting gaming activities that PPI seeks to invalidate").

192. *Id.* at *4.

193. *See* Wozniak, *supra* note 18.

194. *See* Gaming Act, *supra* note 22.

195. *See generally id.* § 2, at 20–25.

196. *Id.* at 19, 37–38.

197. *Id.* at 25.

198. Memorandum from Charlie Christ, Governor of Florida, to Interested Media Regarding the Seminole Compact Accords (Apr. 22, 2009), *available at* http://www.flgov.com/release/10681 [hereinafter Crist Memorandum].

fifteen years.[199] In contrast, the original Compact allowed the Tribe to operate Class III games at all seven of the Tribe's casinos, and required an initial payment of $375 million over the first three years and a minimum payment of $100 million over a span of twenty-five years.[200]

A little more than two months following the passage of the Proposed Compact, tribal leaders and the governor signed a new version of the Proposed Compact.[201] Notably, the Tribe rejected several key provisions contained in the Proposed Compact and set forth new terms to govern their Class III gaming operations.[202] Among other things, the new terms to the Proposed Compact allow the Tribe to offer Class III games at all seven of its Florida casinos.[203] It also provides the Tribe with near exclusive Class III gaming rights outside of Miami-Dade and Broward Counties.[204] Similar to the Proposed Compact, the Tribe's revisions still provide the state with a minimum annual payment of $150 million.[205] In order for the revisions of the Proposed Compact to take effect, however, the Florida Legislature must ratify it.[206] Currently, many lawmakers are reluctant to support the proposal because the terms depart from key provisions lawmakers set forth in the Proposed Compact.[207] Moreover, there has been a large outcry from Florida's pari-mutuel industry, who fear the Tribe's Class III gaming rights will undercut the competition in Florida's gaming industry.[208] Opposition has also mounted from lawmakers in both parties who morally oppose gambling and who are reluctant to expand gambling in Florida.[209] As a result of the various complex issues and varied interests involved, the future of Florida's tribal gaming industry is highly uncertain.[210]

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199. Gaming Act, *supra* note 22, § 2, at 37–38, 51.

200. Crist Memorandum, *supra* note 198; *Crist*, 999 So. 2d at 641–43; *see also supra* notes 13–15 and accompanying text.

201. *See* Crist Press Release, *supra* note 25. For a copy of the revised Compact, see Crist Press Release at Attachments, *available at* http://www.flgov.com/pdfs/20090831 [hereinafter Revised Compact].

202. Dolinski, *supra* note 26; Jeremy Wallace, *Gaming Deal in Jeopardy*, SARASOTA HERALD TRIB., Sept. 19, 2009, at B, *available at* 2009 WLNR 18638693.

203. Dolinski, *supra* note 26; *see* Revised Compact, *supra* note 201, at Part IV.B.

204. Dolinski, *supra* note 26; *see* Revised Compact, *supra* note 201, at Part XII.

205. Dolinski, *supra* note 26; *see* Revised Compact, *supra* note 201, at Part XI.

206. Dolinski, *supra* note 26.

207. *Id.*

208. Jon Hafenbrack, *Senator: Gambling Deal not Sure Thing*, ORLANDO SENTINEL, Sept. 11, 2009, at B1, *available at* 2009 WLNR 17928870.

209. *Id.*

210. *Id.*

C. *Is the Tribe Outplayed? Tribal Considerations Regarding the Proposed Compact*

The tensions between the Tribe and the State in the compact negotiations mainly center on the revenue-sharing provisions in the Proposed Compact[211]—that is, the payments the Tribe commits to pay the State in exchange for the exclusive right to operate Class III games.[212]

Revenue-sharing provisions have been touted as "the most controversial part of state tribal-gaming compacts."[213] Negotiating these provisions requires both parties to undergo a series of fact-intensive inquiries and strategic decisions that have both short-term and long-term implications.[214] Given the political and legal backdrop of tribal-state negotiations in the wake of two significant federal court cases, *Seminole Tribe of Florida v. Florida* and *Texas v. United States*, the State may be endowed with significant political leverage over the Tribe that potentially leaves the Tribe with no recourse to require the State to negotiate the terms of a compact. As a result, the Tribe must consider how firm it wishes to be with its current demands and may need to tread carefully with any future demands it chooses to place on the State. Ultimately, both the State and the Tribe stand to benefit from a successfully negotiated compact. The challenge, however, is to ensure any compact between the Tribe and the State imposes reasonable regulation on the Tribe and provides a steady flow of income to the State. Additionally, state lawmakers must balance the interests of Florida's gaming industry with the concerns of those who are reluctant to expand gambling in Florida.

1. Revenue-Sharing Provisions in the Context of Tribal-State Compacts

Revenue-sharing of tribal gaming takes place through "exclusivity provisions that allow the State to reap the benefits of the lucrative gaming industry."[215] Essentially, these provisions provide tribes "the substantially exclusive right to operate Class III gaming, provided that they contribute a

211. Dolinksi, *supra* note 26 (noting "[t]he terms may require some 'modification'—specifically with regard to exclusive gaming rights for the [T]ribe"); Wozniak, *supra* note 18 (noting the Bill only provides the Tribe with partial exclusivity, "so the $150 million per year may not be justified").

212. *See* Steven Andrew Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 665 (2004).

213. Eidson, *supra* note 43, at 325.

214. Light, Rand & Meister, *supra* note 212, at 659. Accordingly, this Note does not attempt to suggest the specific details of a revenue-sharing provision between the State of Florida and the Tribe. It does, however, set forth important considerations both the Tribe and the State must make when negotiating these provisions.

215. Eidson, *supra* note 43, at 320.

certain portion of their revenues to the state."[216] Notably, "the legal limits of revenue sharing are very much a grey area of the law."[217] Generally, a state is permitted to take payments from a tribe in exchange for providing the tribe with a "valuable economic benefit" or "substantial exclusivity" in the market.[218] Unfortunately, Congress has failed to clarify what constitutes "substantial exclusivity."[219] The Secretary, however, has noted that the benefit the state receives must be "appropriate in light of [the] benefit conferred on the tribe."[220] A payment that exceeds the benefit a tribe receives violates a provision in IGRA that prohibits states from imposing any tax or fees on tribal casinos for executing a compact.[221]

Revenue-sharing arrangements take a number of forms[222] with the payments the tribes make to the states and the exclusivity the states provide in return varying drastically from state to state.[223] Connecticut, for example, provides tribes with a high degree of exclusivity in exchange for a substantial payment from the tribe.[224] Specifically, Connecticut has completely prohibited casino gambling within the state in exchange for 25% of the net gaming revenue generated by the Foxwoods Resort and the Mohegan Sun Resort.[225] While the tribes pay the state a large percentage, the tribes benefit "from a relatively high level of exclusivity" because Connecticut law otherwise prohibits the operation of Class III games and

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216. Eidson, *supra* note 43, at 321.

217. Light & Rand, *supra* note 1, at 435.

218. Light & Rand, *supra* note 1, at 435.

219. Light & Rand, *supra* note 1, at 434–35.

220. Eidson, *supra* note 43, at 326 (quoting *Oversight Hearing on Indian Gaming Regulatory Act; Role and Funding of the National Indian Gaming Commission Before the S. Comm. on Indian Affairs*, 108th Cong. 3 (2003) (statement of Aurene M. Martin, Acting Assistant Secretary, Indian Affairs, Department of the Interior)).

221. 25 U.S.C. § 2710(d)(4) (2006) (noting a state shall not "impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a [C]lass III activity"); *see* Press Release, Bruce Babbitt, Secretary of the Interior, U.S. Department of the Interior, Statement of Secretary of the Interior Bruce Babbitt on the New Mexico Gaming Compacts (Aug. 23, 1997), *available at* http://www.scienceblog.com/community/older/archives/N/int0938.shtml [hereinafter Babbit Press Release] (noting "[t]he Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State" in order to prevent states from "leverag[ing] very large payments from the Tribes, in derogation of Congress' intent" in IGRA).

222. Light, Rand & Meister, *supra* note 212, at 667 (noting revenue-sharing agreements "take a number of forms, including percentage payments, fixed compact payments, impact/mitigation fees and taxes, contributions to community funds, and redistribution to non-gaming tribes").

223. *Id.* at 667–68. Depending on the type of agreement and the amount of gaming revenue tribes realize, annual payments to the state vary dramatically from state to state. *Id.* In 2003 for example, Connecticut tribes paid the state about $400 million, while Arizona tribes and Michigan tribes paid roughly $43 million and $32 million respectively. *Id.* at 668–69.

224. *Id.* at 665.

225. Fletcher, *supra* note 38, at 436. Foxwoods Resort is owned by the Mashantucket Pequots, and the Mohegan Sun Resort is owned by the Mohegan Tribe of Connecticut. *Id.*

slot machines by commercial gaming interests.[226] In contrast, "other states have offered less than total or absolute exclusivity over casino-style gaming in exchange for revenue sharing."[227] In Michigan, for example, where it is impossible for the state to provide absolute exclusivity because "tribal casinos may have saturated the market," the tribes give the state a smaller percentage of their tribal-gaming revenue.[228] One Michigan tribe negotiated an amendment to an existing compact where the tribe and the state agreed the "ability to open satellite gaming facilities constitutes enough of a valuable economic benefit to promise revenue sharing payments of 6% of net gaming revenue" at the tribe's casino.[229]

In the absence of a clear definition of what constitutes "substantial exclusivity," tribes and states are left to determine for themselves how much exclusivity is appropriate in exchange for revenue sharing.[230] Such decisions "are strategic decisions made within a broad and complex context by both tribal and state actors that have both short-term and long-term economic and public policy impacts."[231] Accordingly, before a final agreement is reached, the Tribe and the State must analyze the Proposed Compact's revenue-sharing provisions in the context of the current economic and political situation in the State.[232] In determining whether the Proposed Compact's revenue-sharing provisions are appropriate, the parties must consider difficult questions. For example: Are the Tribe's payments appropriate in light of the exclusivity conferred on the Tribe? Is absolute exclusivity feasible or is partial exclusivity more realistic? If the State agrees to provide the Tribe with more exclusivity, should the State demand larger payments from the Tribe? How do the interests of Florida's gaming industry and the concerns of those who morally oppose gambling factor into the decision? How much is either party willing to concede in return for a successfully negotiated compact? If the parties do not agree to a compact, what are the alternatives?

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226. Light, Rand & Meister, *supra* note 212, at 676.

227. *Id.* (footnote omitted). The Secretary's "position on revenue sharing appears to allow a state to offer a tribe less than total exclusivity, but just how much less is not clear." *Id.* at 676–77 (footnote omitted).

228. Fletcher, *supra* note 38, at 437 (noting "Michigan tribal casinos may have saturated the market to the point that the prospect of giving the state anywhere from 8% to 20% of tribal gaming revenue is unreasonable, and more importantly, unprofitable").

229. *Id.* Note, the Department did not accept or disapprove of the amendment to the compact because it was concerned that the state did not make any meaningful concessions in exchange for a percentage of the gaming revenge. *Id.* at 438.

230. *See* Eidson, *supra* note 43, at 338 (citing *Indian Gaming Regulatory Act Amendments: Hearing on S. 1529, Before the S. Comm. on Indian Affairs*, 108th Cong. 33–36 (2004) (statement of George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Department of the Interior)).

231. Light, Rand & Meister, *supra* note 212, at 659 (footnote omitted).

232. *See id.* at 676.

While both parties must grapple with these difficult decisions, the Tribe, in particular, must also consider another important factor—the Tribe's bargaining position in light of two significant federal court decisions: *Seminole Tribe of Florida v. Florida* and *Texas v. United States*. As this Note suggests, in light of these two decisions, the Tribe and the State may not be sitting at a level bargaining table.

2. *Seminole Tribe of Florida v. Florida* and *Texas v. United States* and their Impact on Tribal-State Negotiations

As noted above, the U.S. Supreme Court, in its landmark decision in *Seminole Tribe*, held that under the Eleventh Amendment, Indian tribes do not have the right to bring suit against a state for failure to comply with the good faith negotiation provision of IGRA.[233] The Court's ruling has resulted in what some have termed the "Seminole problem."[234] In essence, the ruling permits states to simply refuse to negotiate a tribal-state compact, thereby preventing a tribe from engaging in Class III gaming altogether.[235] The ruling effectively shifted the political balance in favor of the states and left tribes with virtually no negotiating power.[236] In other words, *Seminole Tribe* permits a state, if it chooses, to use its "political clout" and refuse to negotiate with the tribe, effectively preventing a tribe from operating Class III games.[237]

Historically, however, tribes have used the Secretarial Procedures as a "trump card" to the *Seminole Tribe* decision. In the event a state asserts its sovereign immunity and refuses to negotiate with a tribe, the tribe can petition the Secretary for a framework to regulate Class III gaming activities.[238] That is, if a state fails to negotiate with a tribe, a tribe can circumvent the state by seeking the Secretary's approval of its Class III gaming proposal.[239] In the past, tribes have used the Secretarial Procedures as leverage to entice states to negotiate because if the tribe bypassed the

233. *See* Eidson, *supra* note 43, at 325; *supra* Part II.A.

234. Statement of Billie, *supra* note 56, at 55 (noting the Tribe "seeks to solve the 'Seminole problem' as it is known (although [the Tribe] see[s] it as the 'State of Florida problem.'")).

235. Eidson, *supra* note 43, at 325; Fletcher, *supra* note 38, at 432; Light & Rand, *supra* note 1, at 431; Light, Rand & Meister, *supra* note 212, at 664–65.

236. *See* Rand & Light, *supra* note 8, at 414–15 (noting the Supreme Court's opinion in *Seminole Tribe of Florida v. Florida* "upset IGRA's careful but tenuous balance of tribal and state authority[]" and "[i]n effect, the Court's decision gave states greater authority over tribes than did Congress through IGRA, as a state could not be sued in federal court by a tribe without the state's consent") (footnote omitted); *see also* Fletcher, *supra* note 38, at 432; Light & Rand, *supra* note 1, at 431; Light, Rand & Meister, *supra* note 212, at 664–65; Rand & Light, *supra* note 8, at 446.

237. Fletcher, *supra* note 38, at 432; Light & Rand, *supra* note 1, at 431; Light, Rand & Meister, *supra* note 212, at 664–65; Rand & Light, *supra* note 8, at 446, 463.

238. *See supra* Part II.A.

239. *See* Light & Rand, *supra* note 1, at 432.

state, the state could potentially lose billions of dollars in gaming revenue.[240] In light of the recent ruling in *Texas v. United States*, however, the traditional trump card may not give tribes the upper hand like it has in the past.[241]

In *Texas v. United States*, the Fifth Circuit Court of Appeals held the Secretarial Procedures are "invalid and constitute an unreasonable interpretation of IGRA."[242] Accordingly, the court held the Secretary does not have the authority to promulgate Secretarial Procedures for a tribe's operation of Class III gaming.[243] The court reasoned "the Secretarial Procedures stand in direct violation" of IGRA's "unambiguous language" and Congress' intent by "bypassing the neutral judicial process that centrally protects the state's role in authorizing tribal Class III gaming."[244] Interestingly, the court recognized the U.S. Supreme Court's decision in *Seminole Tribe* "produced the unexpected result that a state may 'veto' Class III gaming by exercising its Eleventh Amendment sovereign immunity."[245] The court noted, however, that the "outcome has no bearing on the scope of the administrative authority originally delegated by Congress to the Secretary."[246]

Following the Fifth Circuit's ruling striking down the Secretary's regulations, the State of Texas refused to negotiate a compact with the tribe, and as a result, Class III tribal gaming does not exist in Texas today.[247] Unfortunately, the U.S. Supreme Court denied a petition for certiorari,[248] and the Eleventh Circuit Court of Appeals has yet to rule on the validity of the Secretarial Procedures.[249] As a result, the Secretarial Procedures might still be available to the Tribe as no binding court has yet to rule on the issue.

Regardless, in the wake of *Seminole Tribe* and *Texas v. United States*, the Tribe still must consider its weakened bargaining position. By altering

240. Seminole attorneys have already threatened the State that it will seek the Secretary's approval if a compact cannot be negotiated. Wozniak, *supra* note 18. "If we cannot successfully achieve a compact, then we will seek federal authorization directly to engage in (Class III) gaming;" tribal attorney, Barry Richard, said. *Id.* "Either we'll have a new compact with the state or procedures issued by the federal government," Richard said. *Id*.

241. *See* Light & Rand, *supra* note 1, at 432 (noting the Secretary's regulations "have not been of much use to tribes stonewalled by states unwilling to negotiate gaming compacts").

242. Texas v. United States, 497 F.3d 491, 511 (5th Cir. 2007).

243. *Id.* at 503, 509.

244. *Id.* at 509, 511.

245. *Id.* at 504.

246. *Id.*

247. Light & Rand, *supra* note 1, at 432.

248. Fletcher, *supra* note 38, at 433–34.

249. The Southern District of Alabama recently dismissed Alabama's challenge to the Secretarial Procedures on grounds the action was not ripe for review. *See* Alabama v. United States, No. 08-0182-WS-C, 2008 WL 5071904, at *1, 8 (S.D. Ala. Nov. 24, 2008).

key parameters in the Proposed Compact, the Tribe is at risk that the Legislature will reject the new proposal. In light of these two decisions, it is certainly possible that the Tribe will have no recourse to require the State to negotiate a compact. With full understanding of the imbalance in tribal-state relations in light of these two cases, coupled with the apparent resistance among lawmakers to further negotiate the terms of the Proposed Compact,[250] the Tribe must consider how firm it wishes to be with its current demands and tread carefully in any further demands it chooses to make on the State. Nevertheless, if the Tribe chooses to maintain its current demands, it should use any leverage available to it in order to gain concessions from the State. Indeed, in light of the current economic downturn, the revenue the Tribe pays the State is the single most important card the Tribe holds in its hands during its negotiations with the State. Accordingly, the Tribe must use this leverage to "take advantage of the ever-growing state and local governmental reliance" on the Tribe's funds.[251]

All things considered, both the State and the Tribe benefit from agreeing to a compact that contains a delicate balance between the Tribe's interests in operating Class III games and lawmakers' desire to limit gambling in Florida. From the State's perspective, tribal-gaming revenue will help stimulate Florida's economy by infusing billions of dollars into Florida's public education system, creating additional job opportunities at a time of dire need, and alleviating Florida's huge budget deficit.[252] By the same token, the Tribe will also gain significantly from reaching an

250. *Bill Opens Way for Crist, Seminoles to Talk Gaming Compact*, Associated Press, May 8, 2009, *available at* http://www2.tbo.com/content/2009/may/08/081921/bill-opens-way-crist-seminoles-talk-gaming-compact/news-politics/. Senate President Jeff Atwater said, "the tribe probably won't get much better than what the proposal offers." *Id.* "This is a deal that they should take seriously and quickly negotiate and bring closure to," Atwater said. *Id*. Furthermore, Representative Bill Galvano, who led the Florida House of Representative negotiations, recently stated that "the exclusivity provision is not up for negotiation." Dolinski, *supra* note 26.

251. *See* Fletcher, *supra* note 38, at 425. "For states and localities plagued by budgetary shortfalls, tribal gaming increasingly is perceived as a means to recoup losses or even to grow regional economies." Light, Rand & Meister, *supra* note 212, at 679. Florida, in particular, is experiencing record unemployment rates and has a multi-billion-dollar deficit. *See* Crist Memorandum, *supra* note 198. Accordingly, the State is relying upon gaming revenue to help balance budgets, fund programs and pay for Florida's education. *Id.*

252. Pursuant to the terms of the Bill, the Tribe would make an upfront payment of $600 million to the State, which would go directly toward alleviating the State's multi-billion-dollar deficit. *See* Crist Memorandum, *supra* note 198. The Bill is also estimated to generate 45,000 new jobs "at a time of record unemployment in the state" while simultaneously "protect[ing] the jobs of thousands of Floridians currently employed by the gaming industry." *Id.* Perhaps Florida's public schools, which have taken a big hit during the economic downturn, stand to gain the most from the new Bill, as the amount of money going toward educational funding is "equivalent to paying the salaries of more than 12,000 Florida school teachers." *Id.*

agreement with the State. Through the operation of Class III games, the Seminole casinos will raise billions of dollars in tribal revenue that will enable the Tribe to improve its quality of life by building homes and schools and creating infrastructure, among other things.[253]

While both the Tribe and the State assert facially divergent interests—that is, on the one hand, the Tribe's interest to operate Class III gaming, and, on the other hand, the State's desire to limit gambling in Florida—these two positions are not entirely irreconcilable. To begin with, it seems the worst-case scenario for both parties is failure to reach an agreement at all. For the Seminoles, that would be one step closer to the federal government closing down its Class III gaming facilities.[254] For the State, that could mean the Secretary stepping in to issue Class III gaming procedures.[255] Indeed, if the parties cannot reach an agreement, either of these scenarios is probable. In the absence of a valid Class III gaming compact, it is only a matter of time before the federal government steps in and forces the Tribe to halt the illegal gaming activities. By comparison, pursuant to the Secretarial Procedures currently in effect in the Eleventh Circuit, the Secretary could presumably bypass the State and issue a compact which allows the Tribe to operate Class III games. Either of these outcomes results in the loss of billions of dollars to the parties. This is hardly the outcome the Tribe or the State desires. Furthermore, failing to reach an agreement prolongs this nearly two-decade-long battle between the Tribe and the State. Clearly, both parties have a shared interest in resolving this issue amicably and efficiently as future negotiation and potential mediation and litigation may prove costly to both parties. Finally, if the parties fail to reach an agreement, it may be years before a resolution is reached. Even then, neither party can be sure of the outcome.

V. CONCLUSION

This Note has taken an in-depth look at the controversy surrounding the nearly two-decade-long clash between the Seminole Tribe and the State of Florida over the operation of Class III games within the State.

253. *See* Statement of Billie, *supra* note 56. "Class III gaming pursuant to a tribal-state compact . . . would allow the Tribe the economic stability to make long-term economic decisions for the benefit of the Tribe and its members." *Id.* A Class III gaming compact would enable the Tribe to "expand[] rehabilitation services and on-reservation treatment for chronically ill tribal members, improve[] surface-water control systems, [and roads], expand[] cultural programs and increase[] investment in non-gaming economic development activities."*Id.* Inevitably, tribal-gaming will allow "the Tribe to meet its own needs, rather than relying on handouts from the federal government."*Id.*

254. Babbitt Press Release, *supra* note 221 (noting if a tribe does not agree to a compact, "existing gaming establishments may be threatened with closure"); *see supra* Part I (explaining the benefit tribal gaming has on both Indian and non-Indian communities).

255. *See supra* notes 48–52 and accompanying text.

Understanding that compact agreements are strategic decisions that have economic and public-policy impacts, this Note does not seek to encourage the Tribe or the State to take any particular action with regard to a Class III gaming compact. This Note merely encourages both parties to seek a mutually-beneficial resolution. All things considered, both the State and the Tribe stand to gain from reaching an agreement. In the wake of *Seminole Tribe of Florida v. Florida* and *Texas v. United States*, however, this Note cautions the Tribe to tread carefully in any negotiations with the State, as there is a possibility it will have no recourse to require the State to negotiate compact terms.

Clearly, the challenge here is for both parties to be creative in formulating options and to tailor an agreement that contains enough exclusivity to satisfy IGRA but assures the State appropriate compensation. Accordingly, the parties must strike a delicate balance among the Tribe's interests in operating Class III games, lawmakers' desire to limit gambling in Florida, and third-party interests to maintain competition in Florida's gaming industry. The key is ensuring the compact imposes a reasonable regulation on the Tribe and provides a steady flow of income to the State. In the interest of all parties involved—the Governor of Florida, the Florida Legislature, Seminole Tribe officials, Florida's gaming industry, and the citizens of the State of Florida—the State and the Tribe must work together to secure a viable solution to this problem before an unfavorable solution is imposed on them.